85-1203

No. _____

Supreme Court, U.S.
FILED
DEC 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DICK TANNERY AND ROBERT PERRINE,

Petitioner,

v.

MARGARET A. WOLFENBARGER
d/b/a SHADY SAM'S PAWN SHOP,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE *
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ATTORNEYS FOR RESPONDENT

* Counsel of Record

December, 1985

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QUESTION PRESENTED

1. Whether prosecutors deprive a pawnbroker of property without due process of law when they return stolen property, previously seized by police from the pawnbroker, to its rightful owner without following state procedures for determining the ownership of stolen property where the prosecutors believe the pawnbroker has no interest in the stolen property and where the State has in place post-deprivation remedies to consider the pawnbroker's claim.*

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*Parties to the action below were Margaret A. Wolfenbarger, d/b/a Shady Sam's Pawn Shop, Clancy Williams, Loy Bean, Robert L. Gillian, Dick Tannery, District Attorney of Comanche County, Oklahoma, Robert Perrine, former Assistant District Attorney of Comanche County, Oklahoma, and the City of Lawton, Oklahoma, a municipal corporation.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. _____

DICK TANNERY AND ROBERT PERRINE,

Petitioners,

v.

MARGARET A. WOLFENBARGER
d/b/a SHADY SAM'S PAWN SHOP,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, Dick Tannery, District Attorney of Comanche County, Oklahoma, and Robert Perrine former Assistant District Attorney of Comanche County, Oklahoma, by and through the Attorney General of the State of Oklahoma, Michael C. Turpen, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.

OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit for which this petition is sought has been designated for publication but is not yet reported. The style in the Court below was Wolfenbarger, d/b/a Shady Sam's Pawn Shop v. Williams, et al., Tenth Circuit Court of Appeals No. 83-2331. The Opinion for which review is sought was rendered on September 26, 1985. These Defendants filed no petition for rehearing, although other Defendants below did file such a motion. We anticipate that Defendant Police Officers of the City of Lawton, Oklahoma, and the City of Lawton, Oklahoma itself will separately file a Petition for Writ of Certiorari herein. The text of the Opinion and Orders by the United States District Court of Oklahoma are attached hereto as Appendix A, B and C and the

Opinion of the Court of Appeals for which review is sought is attached hereto as Appendix D. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. § 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

Title 51 O.S.Supp.1978, § 153 states in its entirety:

Each political subdivision of this state shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment or duties subject to the limitations specified in this act. A political subdivision shall not be liable under the provisions of this act for any act or omission of an employee because of corruption or fraud of the employee.

Title 51 O.S.Supp.1978, § 162 states in pertinent part:

§162. Constitutional or statutory rights, privileges or immunities-Violation by employee-Defending-Indemnification-Right of recovery-Punitive or exemplary damages

A. A political subdivision, subject to procedure requirements imposed by statute, ordinance, resolution or written policy, shall:

. . .

2. Pay or cause to be paid any judgment entered against any employee and/or political subdivision or settlement agreed to by the political subdivision entered against

> any employee; and any costs or fees, for a violation of property rights or any rights, privileges or immunities secured by the Constitution or laws of the United States which occurred while the employee was acting within the scope of employment.

Title 74 O.S.Supp.1976, § 20f states in pertinent part:

> F. Any officer or employee who acts outside of the scope of his official authority shall be liable in damages in the same manner as any private citizen.

STATEMENT OF THE CASE
PROCEDURAL HISTORY

This case was originally a civil rights action filed in the United States District court for the Western District of Oklahoma, pursuant to 42 U.S.C. § 1983, in which the Plaintiff asserted federal jurisdiction under the provisions of 28 U.S.C. §§ 1331 and 1343(3). The issues asserted herein were first raised by the Defendants below in a Motion to Dismiss or Motion for Summary Judgment. Because the District Court granted the

Motions to Dismiss or for Summary Judgment of all Defendants prior to trial there is no transcript of proceedings below. The statement of facts which follows has been excerpted from the Opinion of the Court of Appeals and may generally be accepted as correct. Footnotes have been omitted.

STATEMENT OF THE FACTS

Wolfenbarger owns and operates Shady Sam's Pawn Shop in Lawton, Oklahoma. On August 15, 1980, Williams entered Shady Sam's while investigating a report of stolen property. The property, a stereo receiver and cassette player, had been reported as stolen, by the owner, a Mr. Logens, on August 13, 1980. In the course of his investigation of the pawnshop, Williams discovered that the serial numbers listed on two pawn tickets matched the numbers of the stolen stereo equipment. Williams did not confiscate the two items at that time but instead

issued the pawnshop a ticket, placing the property on "hold". A "hold" was an official police request that a pawnshop not sell or otherwise dispose of items needed as evidence in a criminal investigation or prosecution. This was the Lawton police department practice in effect when Williams first discovered the property in Shady Sam's.

On October 30, 1980, District Attorney Tannery wrote a letter to Chief Gillian informing him of a change in the procedure Lawton police were to follow when they discovered suspected stolen property in pawnshops. The letter stated:

"Dear Chief Gillian"

After reviewing the applicable law, I would advise the use of the procedure used by Oklahoma and Tulsa Counties regarding stolen property recovered in pawn shops, to-wit:

1. Under the authority of 21 OS § 1092 the officer and or true owner of merchandise should inspect the pawn shops for the stolen merchandise.

2. All stolen property found should be treated as if recovered from other parties. That means that the officers should seize the property and place it on property receipt in custody of the police department.

3. Under 22 OS § 1321 et seq. the magistrate will determine the disposition of the property.

Sincerely,

/s/ Dick Tannery
District Attorney"

Rec., vol. I, at 89.

Okla. Stat. tit. 21 § 1092 (1981) requires a pawnbroker to permit a police officer to inspect the premises for stolen goods during usual business hours. Okla. Stat. tit. 22 §§ 1321 et seq. (1981) provides procedures to be followed when a police officer comes into possession of property allegedly stolen. Sections 1321 and 1322 provide that a magistrate must determine the true owner of any such property before the police may release it from their custody.

Coleman v. Faulkner, 697 F.2d 1347, 1348 (10th Cir. 1982).

Gillian promulgated Tannery's letter to all members of the Lawton police department. On November 10, Williams and Bean returned to Shady Sam's and seized the two items Williams had previously identified and placed on hold. After giving Wolfenbrger a receipt for the items, Williams placed them in the Lawton police station property vault. Acting on District Attorney Tannery's behalf, Perrine sent a memorandum on November 13 to Williams directing him to release the two items to Logens. Williams complied the next day and gave the items to Logens. Wolfenbarger was not notified of the property's release nor was there any judicial determination of the property's ownership before Perrine ordered it released.

Immediately after Williams seized the two items, Wolfenbarger brought a replevin action against him in state court. After Williams gave the items to Logens, the court declared the replevin action moot because Williams no longer had possession. Thereafter, Wolfenbarger brought this action in federal court alleging that defendants' conduct had deprived her of her right to due process under the United States Constitution. The district court held that Wolfenbarger, as a holder of stolen goods, had no constitutionally protected property right in the items and thus could not claim a due process violation. The court granted summary judgment in favor of defendants.

REASONS FOR GRANTING PETITION

PROPOSITION I

THE COURT BELOW DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT

WITH THIS COURT'S DECISION IN HUDSON V. PALMER.

The due process issue raised herein arose when prosecutors returned some stolen stereo equipment to its rightful owner. Police had previously seized that stereo equipment from the Plaintiff-pawnbroker. The prosecutors reasoned that the pawnbroker had no property interest in the stereo equipment vis a vis the true owner from which it had been stolen. Therefore, they did not use the State statutory procedure for determining the ownership of stolen property.

Assuming, without conceding, that the prosecutors acted improperly in returning the stereo equipment to its rightful owner without a hearing, we believe the due process question is controlled by this Court's decision in Hudson v. Palmer, 468 U.S. ___, 82 L.Ed.2d 393 (1984). In that case, this Court held:

> Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.
>
> Respondent presses two arguments that require at least brief comment. First, he contends that, because an agent of the state who intends to deprive a person of his property "can provide predeprivation process, then as a matter of due process he must do so." Brief for Respondent 8 (emphasis in original). This argument reflects a fundamental misunderstanding of Parratt. There we held that postdeprivation procedures satisfy due process because the State cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the State is in a position to provide for predeprivation process. (Emphasis added).

Id., 468 U.S. at ____, 82 L.Ed.2d at 407-408. (Footnote omitted). We believe

this language from the Court's opinion in Hudson resolves the issue presented herein. It is simply of no consequence that the prosecutors herein could have provided for predeprivation process. The controlling inquiry is solely whether the State of Oklahoma was in a position to provide for predeprivation process before its prosecutors, rightly or wrongly as a matter of state property law, returned the stolen stereo equipment to its rightful owner without a hearing. The answer to that question must be an emphatic "No."

The Court strayed from this Court's pronouncement that the controlling inquiry is solely whether the State is in a position to provide for predeprivation process and focused its inquiry on the ability of the police or prosecutors to provide process.

First, the Court noted that the State had provided for predeprivation process by enacting 22 O.S. § 1321 and 1322. Sl. Op. at 12-13. From this, the Court concluded that Oklahoma has recognized that a hearing after police initially take possession of property and before they release it is the most timely and efficient point at which to adjudicate property interests. Sl. Op. at 13. With this proposition we heartily agree. However, the State of Oklahoma, having passed these statutes, could not anticipate or forestall the unauthorized return of stolen stereo equipment to the rightful owners. As in the negligent loss of property in Parratt or the intentional destruction of property in Hudson the State of Oklahoma could not effectively provide predeprivation process before prosecutors released the property without a hearing.

The Court below also misconstrued this Court's precedents by attempting to characterize the actions herein as an established State procedure. The Court below relied upon this Court's decision in Logan v. Zimmerman Brush Company, 455 U.S. 422, 432 (1982), for the proposition that once the State has conferred a property interest, it may not authorize the deprivation of such an interest without procedural safeguards that comport with the standards of federal due process. Sl. Op. at 14. We also heartily agree with this proposition. However, we must point out that the State of Oklahoma at no time authorized the return of the stereo equipment without a hearing. Quite the contrary, by statute Oklahoma called for a hearing. The return of the property to Mr. Logens without a hearing was not authorized by the State but was contrary to State policy which required a

hearing to determine ownership of the stereo equipment.

The Court below next relied upon the case of Patterson v. Coughlin, 761 F.2d 886 (2nd Cir. 1985), for a proposition which we believe runs contrary to this Court's opinion in Hudson. Relying on Patterson, supra, the Court below stated that where responsible state officials who had the power to grant a hearing knew the Plaintiff was in peril of being deprived of a liberty interest the deprivation was neither "random" nor "unauthorized." Wolfenbarger, Sl. Op. at 15 citing Patterson v. Coughlin, 761 F.2d at 892.

Such a conclusion stands on its head this Court's pronouncement that the controlling inquiry is solely whether the State, not its employee, is in a position to provide for predeprivation process.

Hudson v. Palmer, 468 U.S. at ___, 82 L.Ed.2d at 408. Thus, the Court below based its decision upon a proposition explicitly rejected by this Court in Hudson. It did so after citing the very language from Hudson which states that the controlling inquiry is solely whether the State is in a position to provide for predeprivation process only three pages earlier in the Slip Opinion.

We believe that it is vitally important for the Court to realize that the State of Oklahoma did not return the stereo equipment to its rightful owner. The State of Oklahoma is not, and cannot be, a party to this action. Only the State could deny the Plaintiff due process and the State of Oklahoma provided for a hearing to determine the ownership of stolen property. The State of Oklahoma could not predict that its prosecutors would return the property to

its rightful owner without that hearing. However, as will be shown below, the State of Oklahoma has in place postdeprivation remedies to consider Plaintiff's claim.

The Court below sought to avoid reliance upon those remedies by finding that District Attorney Tannery had enacted a policy which permitted the abuse of his official authority. This conclusion is simply wrong. We invite the Court's attention to the text of the letter of October 30, 1980, from District Attorney Tannery to Lawton City Police Chief Gillian. The text of this letter is set out in the statement of facts above. The third numbered paragraph in that letter states that under 22 O.S. § 1321 et. seq. the magistrate will determine the disposition of stolen property. We are at a loss to determine how the Court below found that

the return of the stolen stereo equipment was a policy of the District Attorney when the District Attorney's letter relied specifically upon the proper statute. Rather, the prosecutors Tannery and Perrine, in reliance upon their understanding of Oklahoma property law, determined that the pawnbroker had no property interest in the stolen property vis a vis the rightful owner, and thus, no hearing was necessary. Assuming for a moment this conclusion was wrong, and we would note that the Court below relied in part upon an Oklahoma case decided three years after the fact to reach its conclusion, it can only be concluded that the prosecutors acted in reasonable and objective good faith in their actions. They did not act in keeping with some policy of the District Attorney but acted under unique circumstances and based upon an understanding of Oklahoma property law

which the District Court below found reasonable and accepted.

The Court below attempted to find the authority of a District Attorney to make such a "policy" in 19 O.S. 1981, § 215.5 and in Opinion of the Oklahoma Attorney General No. 79-98 (1979). Neither of these provisions of Oklahoma law authorizes a District Attorney to override the State statutory method of disposing of stolen property. First, 19 O.S. 1981, § 215.5 merely provides that the District Attorney may give his opinion, upon request, to various county officials in matters relating to the duties of county officials or in matters in which they may have an interest. We must note at this point that the letter relied upon by the Court of Appeals was not directed to a County Official but to the Police Chief of the City of Lawton, Oklahoma. Second,

Oklahoma Attorney General's Opinion No. 79-98 only stands for the proposition that there is no chief law enforcement official among county officers and that both the District Attorney and the Sheriff are to perform their duties which in turn will assist each other in the completion of law enforcement duties. Neither provision of Oklahoma law empowers District Attorneys to create their own "policies" with regard to the disposition of stolen property in contravention to State law. Neither prosecutor in this case relied upon these provisions in returning the stolen stereo equipment to Mr. Logens, but relied upon their understanding that the pawnbroker had no property interest which required the protection of due process.

The Court below implicitly found the Oklahoma Political Subdivision Tort Claims Act, 51 O.S. 1981, § 151 et seq.

to be a satisfactory postdeprivation remedy in Lavicky v. Burnett, 758 F.2d 468, 472 (10th Cir. 1985). The statute in effect at the time of the event herein, 51 O.S. Supp. 1978, § 153, made each political subdivision liable for the torts of its employees acting within the scope of their employment. Further, 51 O.S. Supp. 1978, § 162(a)(2) required political subdivisions to pay any judgments entered against an employee along with costs or fees for the violation of the property rights or any rights, privileges or immunities secured by the Constitution. Further, 74 O.S. Supp. 1976, § 20f(F) provides that any state officer or employee who acts outside the scope of his official authority is liable in damages in the same manner as any private citizen. In addition, albeit after the event in question, the Oklahoma Supreme Court has

created a common law right of action for Constitutional violations in Oklahoma courts. Prock v. District Court of Pittsburg County, 630 P.2d 772, 779 (Okl. 1981). Finally, normal remedies such as writs of replevin or tort suits for conversion would be applicable in cases such as the one at hand. Clearly, the State of Oklahoma has provided a panoply of post-deprivation remedies for such cases.

We respectfully invite the Court's attention to Judge Seth's dissenting opinion below, set out in Appendix D, which we believe correctly states the law.

PROPOSITION II

THE DECISION OF THE COURT BELOW CONFLICTS WITH LAW FROM SEVERAL OTHER COURTS OF APPEALS.

Not only does the decision of the Court below conflict with this Court's opinion in Hudson v. Palmer, supra, it

conflicts with decisions on similar issues from several other courts of appeals. For instance, in Wilkins v. Whitaker, 714 F.2d 4, 6-7 (4th Cir. 1983), the Fourth Circuit applied this Court's rationale of Parratt v. Taylor, supra to the removal of property from a criminal defendant's car and its later release to that criminal defendant's sister and a relative of his wife. The Fourth Circuit also relied upon Parratt in Daniels v. Williams, 720 F.2d 792, 796 (4th Cir. 1983), a liberty interest case in which an inmate claimed he had negligently been deprived of liberty when jailers permitted a fellow inmate to leave a pillow on a stairwell.

In Thibodeaux v. Bordelon, 740 F.2d 329, 336-338 (5th Cir. 1984), the Court of Appeals held that a plaintiff must allege the insufficiency of state remedies in a case involving the claimed deprivation of liberty by an inmate who was injured by a

fire set by another inmate. In Augustine v. Doe, 740 F.2d 322, 328-29 (5th Cir. 1984), the Fifth Circuit remanded for further proceedings to determine whether the seizure of plaintiff's dog was random and unauthorized or was a result of established policy. In a case very pertinent to the one in hand, the Fifth Circuit in Collins v. King, 743 F.2d 248, 254 (5th Cir. 1984), held Parratt and Hudson applicable to the allegations that a high ranking prison official, biased against the plaintiff, sat in a disciplinary case only to punish the plaintiff for past events. The Collins case is particularly pertinent here because it dealt with allegations that the prison official was biased and that his actions had corrupted the integrity of a disciplinary hearing. It seems to us that if such allegations are subject to the rule of Parratt and Hudson the simple

failure to conduct a hearing in the present case must be equally covered by Parratt and Hudson.

In Wagner v. Higgins, 754 F.2d 186, 191-92 (6th Cir. 1985), the Court of Appeals applied Parratt and Hudson to allegations that police lost or stole property when searching the plaintiff's impounded automobile. Further, in Vicory v. Walton, 721 F.2d 1062, 1065-66 (6th Cir. 1983), the Court of Appeals held that a plaintiff must plead and prove the inadequacy of state remedies in a case involving the warrantless seizure of a mobile home as evidence in a homicide. Necessarily, in Vicory the defendant prosecutor and law enforcement officers could have obtained a warrant to hold the mobile home shortly after the discovery of the homicide therein and thus could have had the seizure subject to judicial approval, the very failure Plaintiff herein challenges.

The Seventh Circuit in Wolf-Lillie v. Sonquist, 699 F.2d 864, 871-72 (7th Cir. 1983), held that federal courts must consider the adequacy of state remedies and applied this Court's decision in Parratt to a property deprivation case in which sheriff's deputies executed a stale writ of restitution to seize a mobile home. Significantly, the Seventh Circuit in Ellis v. Hamilton, 669 F.2d 510, 515 (7th Cir. 1982), applied Parratt to allegations by adoptive grandparents that welfare workers had taken their adopted grandchild and arranged for its adoption by strangers. Part of plaintiff's allegation in Ellis was that welfare workers and a defendant judge actively interferred with their efforts to use the judicial process to seek return of their children. Id., 669 F.2d at 511-12. It seems reasonable that if Parratt applies to allegations of sabotage of the

judicial process it should equally apply to allegations that no hearing was held.

In Hubenthal v. City of Winona, 751 F.2d 243, 246 (8th Cir. 1984), the Court of Appeals dealt with allegations that officials had gone beyond the scope of a judicial order and had taken or destroyed property when cleaning up a worm farming operation. If Parratt applies to allegations that officials went beyond their authority in executing court orders it seems also applicable to circumstances in which officials believed no court action was necessary, as herein. In White v. Clark, 750 F.2d 721, 722 (8th Cir. 1984), the Court of Appeals applied Parratt and Hudson to an allegation that Secret Service Agents had seized property during an arrest and had given it to third parties rather than to its rightful owner. This conclusion goes even farther than the one we would seek herein because

it is undisputed that prosecutors Tannery and Perrine returned the stolen stereo equipment to its rightful owner rather than giving it to a third party who had no claim to it.

Finally, we invite the Court's attention to Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), affirmed on other grounds sub. nom., Kush v. Rutledge, 469 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983), in which the Ninth Circuit applied the rationale of Parratt to allegations that a football coach punched a player in the mouth and thus deprived him of liberty. We respectfully submit that the State of Oklahoma could no more predict and forestall the return of the stereo equipment to its rightful owner without a hearing than could the State of Oklahoma forestall the punch of a football player in the mouth by his coach. In neither case could the state provide

predeprivation process and in both cases, the postdeprivation process is adequate.

Clearly, the Courts of Appeals have applied this Court's decisions in Parratt and Hudson to a wide variety of cases involving claimed deprivations of liberty and property. The decision of the Court below is contrary to many of these opinions as well as to the opinions of this Court itself. Therefore, we respectfully ask this Court to grant the Writ of Certiorari to review the decision of the Court below and to correct errors of the Tenth Circuit. These errors affect the liability of public servants throughout that circuit to civil rights cases for what can only be described as minor matters determining the ownership of stolen property.

The attempt by the Court below to characterize the actions of these

prosecutors as pursuant to a "policy" and beyond the reach of Parratt and Hudson jeopardizes public officials throughout the Tenth Circuit to the burdens of federal litigation in cases which can be and should be, resolved easily in state courts. This result can only serve unnecessarily to increase friction between the state and federal governments and to add to the already crowded dockets of our federal courts. A contrary result, one in keeping with this Court's decisions in Parratt and Hudson, could only serve to have the appreciation of the states and their courts for postdeprivation remedies sufficient to remedy the random and unauthorized property deprivations of state employees.

It is this result that we urge in the present case.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

MARGARET A. WOLFENBARGER, d/b/a Shady Sam's Pawn Shop,	)	
Plaintiff,	)	
v.	)	CIV-82-1945-W
CLANCY WILLIAMS, LOY BEAN, ROBERT GILLIAN, DICK TANNERY, ROBERT PERRINE and THE CITY OF LAWTON, OKLAHOMA, a municipal corporation,	)	
Defendants.	)	

O R D E R

The defendants the City of Lawton, Clancy Williams, Loy bean, and Robert L. Gillian, moved the Court pursuant to Rule 12(b)(6), F.R.Civ.P., to dismiss the complaint of the plaintiff, Margaret A. Wolfenbarger d/b/a Shady Sam's Pawn Shop, for failure to state a claim upon which relief could be granted. The defendants submitted a brief and an exhibit in

support of their motion and the plaintiff responded by brief and exhibits. As the parties presented material outside the pleadings for the Court's consideration with regard to several issues, the motion to dismiss, after timely notice to the parties. was converted to a motion for summary judgment. The three individual defendants also moved the Court prior to the conversion of the motion to dismiss for sumary judgment on one issue also raised in the motion to dismiss. All supplemental materials have been received and examined and upon consideration of the submissions of the parties and of the standards by which summary judgments are governed, the Court makes the following determination with regard to the issue which is dispositive of this action.

The plaintiff, who is a licensed pawnbroker in the state of Oklahoma, has complained that on November 10, 1980,

defendant Williams, a police officer of the City of Lawton, under the direction of defendant Bean, also a police officer of the City of Lawton, entered the plaintiff's place of business and seized a Marantz receiver and a Sony cassette deck; that the seizure was under the direction of co-defendants, Dick Tannery, the District Attorney for Comanche County, Oklahoma, and Robert Perrine, Assistant District Attorney; that the plaintiff sought relief in the District Court of Comanche County, Oklahoma, but was unable to recover the property since defendant Williams, at the direction of defendant Perrine, gave the property to a third party; that co-defendants, the City of Lawton and Gillian, Chief of Police of Lawton, permitted and continue to permit this policy established by District Attorney Tannery of confiscation of private property without judicial warrant;

and that the actions of these defendants caused plaintiff's property to be taken in violation of 42 U.S.C. § 1983.

The policy of which the plaintiff complains is embodied in a letter sent to defendant Gillian as Chief of Police by defendant Tanner in his capacity as District Attorney. The letter reads in pertinent part:

> "After reviewing the applicable law, I would advise the use of the procedure used by Oklahoma and Tulsa Counties regarding stolen property recovered in pawn shops, to-wit:
>
> 1. Under the authority of 21 O.S. § 1092 the officer and or true owner of merchandise should inspect the pawn shops for the stolen merchandise.
>
> 2. All stolen property found should be treated as if recovered from other parties. That means that the officers should seize the property and place it on property receipt in the custody of the police department.
>
> 3. Under 22 O.S. § 1321 et seq. the magistrate will determine the disposition of the property."

The defendants, whose arguments are based on the fact that the property seized from the plaintiff was stolen and returned to its true owner, have contended the the complaint should be dismissed for three reasons: (1) it fails to allege the plaintiff's property interest in the confiscated property; (2) it fails to allege a policy adopted by the defendant municipality; and (3) it fails to allege a deprivation of due process since there was a state remedy available to the plaintiff. The defendants have also argued that the Court should abstain in this proceeding pending completion by the Oklahoma Supreme Court of a similar case, an argument which is now moot, and that the defendant officers as agents of the prosecutor are cloaked with prosecutorial immunity. As the Court find sthe argument regarding the plaintiff's property interest dispositive of this action, the

property passes to the pledgee), and it is this special property interest that the plaintiff has asserted as her protected property right in the items seized. The authority indicates further that pawnbrokers can acquire more than just a special property interest if a default in the pledge occurs. 72 C.J.S. Pledges § 2 (1951).

The Court recognizes that questions of fact do exist which would render summary judgment inappropriate under the federal rules under different circumstances--such questions being whether a default in the pledge had occurred or whether title remained in the pledgor with possession only passing to the plaintiff as pledgee.

These potential questions of fact however overlook the most critical factual finding in this case and that is the undisputed fact that the property seized

by the defendant officers was stolen and returned to the true owner, Louie E. Loggens, who had reported the items stolen on August 13, 1980. co-defendant Tannery learned that the items were in the plaintiff's possession as a result of her compliance wiht the City of Lawton Code, Section 7-147 and 7-148, which require pawnbrokers to disclose lists of pawned property and upon such information, he initiated the seizure of the property by the officers.

In order to plead a prima facie claim of civil rights deprivation under section 1983, the plaintiff must allege some conduct of the defendants depriving her of a right secured by the Constitution and the laws of the United States, and a plaintiff has a cause of action under 1983 if she is deprived of property through state action without due process of law.

No one has denied that the instant

plaintiff was deprived of property. It is the fact that the plaintiff's rights in the property are inferior to the rights of the true owner in the property that defeats her cause of action. The plaintiff can acquire no better right in or title to the property than the plaintiff has failed to allege a protected property rights. E.g., Al's Auto Sales v. Moskowitz, 203 Okla. 611, 224 P.2d 588 (1950); Adkisson v. Waitman, 202 Okla. 309, 213 P.2d 465 (1950); see 72 C.J.S. Pledges § 26(b). See also 12A O.S. 2-403(1) (buyer cannot acquire greater title than seller). The Court does not interpret section 1983 or the Constitution to permit the recovery of damages for seized property to a person whose right therein is in derogation of the rights of the trueowner.

Where no genuine disputed material factual issues exist as to a plaintiff's

claim for relief, summary judgment is appropriate under the federal rules. Rule 56, F.R.Civ.P. As the Court has found that it is uncontrovered that the property seized by the defendant officers was stolen and returned to the true owner, and the plaintiff had no recognized and protected property interest in the property seized as determined by state law under these circumstances, the Court finds further that the plaintiff cannot support a claim of civil rights deprivation by seizure of property without due process.

Accordingly, the Court finds that the converted Motion to Dismiss of defendnats Williams, Bean and Gillian and the defendant municipality is GRANTED. This finding renders MOOT the Motion for Summary Judgment of defendants Williams, Bean and Gillian.

IT IS SO ORDERED this 20th day of

September, 1983.

LEE R. WEST
United States District
Judge

WESTERN DISTRICT OF OKLAHOMA

Oklahoma City, Oklahoma

Dated: September 20, 1983

Margaret A. Wolfenbarger d/b/a	)	
Plaintiff,	)	
vs.	)	Case No. CIV-82-1945-W
Clancy Williams et al.,	)	
Defendant.	)	

To Herbert T. Hope, Clerk:

Please enter the following minute order in the above entitled case.

In an Order previously entered in this matter, the Court dismissed the plaintiff's action against defendants Clancy Williams, Loy Bean, Robert L. Gillian, and the City of Lawton. The factual findings and legal conclusions rendered by the Court in that decision are dispositive of the motions urged by defendant Dick Tannery in this action and thus, the Court finds based upon the same that the Motion to Dismiss and the Motion for Summary Judgment are GRANTED.

UNITED STATES DISTRICT JUDGE

- 1c -

WESTERN DISTRICT OF OKLAHOMA

Oklahoma City, Oklahoma

Dated: September 20, 1983

Margaret A. Wolfenbarger d/b/a	)	
Plaintiff,	)	
vs.	)	Case No. CIV-82-1945-W
Clancy Williams et al.,	)	
Defendant.	)	

To Herbert T. Hope, Clerk:

Please enter the following minute order in the above entitled case.

In an Order previously entered in this matter, the Court dismissed the plaintiff's action against defendants Clancy Williams, Loy Bean, Robert L. Gillian, and the City of Lawton. The factual findings and legal conclusions rendered by the Court in that decision are dispositive of the motions urged by co-defendant Robert Perrine in this matter and thus, the Court finds based on the same that the Motion to Dismiss is GRANTED. Such a finding renders MOOT defendant Perrine's Motion for More Definite Statement.

UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 83-2331

MARGARET A. WOLFENBARGER,
d/b/a Shady Sam's Pawn Shop,

Plaintiff-Appellant,

v.

CLANCY WILLIAMS, LOY BEAN,
ROBERT L. GILLIAN, DICK TANNERY,
ROBERT PERRINE, THE CITY OF
LAWTON, OKLAHOMA, a Municipal
Corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. 82-1945-W)

Seymour, Breitenstein, and Seth Circuit Judges.

SEYMOUR, Circuit Judge:

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this

appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

Margaret Wolfenbarger brought this action under 42 U.S.C. § 1983 (1982) against the City of Lawton, City police officers Clancy Williams and Loy Bean, Chief of Police Robert Gillian, Comanche County District Attorney Dick Tannery, and Comanche County Assistant District Attorney Robert Perrine. Wolfenbarger, a licensed Oklahoma pawnbroker, alleges that defendants violated her constitutional right to due process when they seized certain property from her pawnshop and turned it over to a third party. The district court held that Wolfenbarger did not have a protected property interest in the items, and granted summary judgment in favor of defendants. We reverse.

I.

BACKGROUND

Wolfenbarger owns and operates Shady Sam's Pawn Shop in Lawton, Oklahoma. On August 15, 1980, Williams entered Shady Sam's while investigating a report of stolen property. The property, a stereo receiver and cassette player, had been reported as stolen,[1] by the owner, a Mr. Logens, on August 13, 1980. In the course of his investigation of the pawnshop, Williams discovered that the serial numbers listed on two pawn tickets matched the numbers of the stolen stereo equipment. Williams did not confiscate the two items at that time but instead issued the pawnshop a ticket, placing the property on "hold". A "hold" was an

[1]The record indicates that the property was apparently stolen and pawned by an unknown third party. Although the Lawton police conducted an investigation, no one was ever identified or charged in the theft.

official police request that a pawnsnop not sell or otherwise dispose of items needed as evidence in a criminal investigation or prosecution. This was the Lawton police department practice in effect when Williams first discovered the property in Shady Sam's.

On October 30, 1980, District Attorney Tannery wrote a letter to Chief Gillian informing him of a change in the procedure Lawton police were to follow when they discovered suspected stolen property in pawnshops. The letter stated:

"Dear Chief Gillian"

After reviewing the applicable law, I would advise the use of the procedure used by Oklahoma and Tulsa Counties regarding stolen property recovered in pawn shops, to-wit:

1. Under the authority of 21 OS § 1092 the officer and or true owner of merchandise should inspect the pawn shops for the stolen merchandise.

2. All stolen property found should be treated as if recovered from other

> parties. That means that the officers should seize the property and place it on property receipt in custody of the police department.
>
> 3. Under 22 OS § 1321 et seq. the magistrate will determine the disposition of the property.
>
> Sincerely,
> /s/ Dick Tannery
> District Attorney"

Rec., vol. I, at 89.[2]

Okla. Stat. tit. 21 § 1092 (1981) requires a pawnbroker to permit a police officer to inspect the premises for stolen goods during usual business hours.[3]

[2]A copy of this letter was also distributed to all pawnshop owners listed in the yellow pages of the Lawton telephone book.

[3]Section 1092 provides:

> "Every pawnbroker or person carrying on the business of a pawnbroker, and junk dealer, who having received any goods which have been embezzled or stolen, refuses or omits to exhibit them, upon demand, during the usual business hours, to the owner of said goods or his agent authorized to demand an inspection thereof, or any peace officer, is guilty of a felony."

Okla. Stat. tit. 22 §§ 1321 et seq. (1981) provides procedures to be followed when a police officer comes into possession of property allegedly stolen. Sections 1321 and 1322 provide that a magistrate must determine the true owner of any such property before the police may release it from their custody.[4] Coleman v. Faulkner, 697 F.2d 1347, 1348 (10th Cir. 1982).

[4]Sections 1321 and 1322 provide:

> "§ 1321. Stolen property to be held by officer.
>
> When property alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by [Section 1322] to direct the disposal thereof.
>
> "§ 1322. Stolen property -- Magistrate to order delivery, when.
>
> On satisfactory proof of the title of the owner of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling the property, may order it to be delivered to the owner on his paying

Gillian promulgated Tannery's letter to all members of the Lawton police department. On November 10, Williams and Bean returned to Shady Sam's and seized the two items Williams had previously identified and placed on hold. After giving Wolfenbrger a receipt for the items, Williams placed them in the Lawton police station property vault. Acting on District Attorney Tannery's behalf, Perrine sent a memorandum on November 13 to Williams directing him to release the two items to Logens. Williams complied the next day and give the items to Logens.[5] Wolfenbarger was not notified

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> the reasonable and necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property."

[5]It is undisputed that the two stereo items were stolen from Logens or that he was the true owner.

of the property's release nor was there any judicial determination of the property's ownership before Perrine ordered it released.

Immediately after Williams seized the two items, Wolfenbarger brought a replevin action against him in state court. After Williams gave the items to Logens, the court declared the replevin action moot because Williams no longer had possession. Thereafter, Wolfenbarger brought this action in federal court alleging that defendants' conduct had deprived her of her right to due process under the United States Constitution. The district court held that Wolfenbarger, as a holder of stolen goods, had no constitutionally protected property right in the items and thus could not claim a due process violation. The court granted summary judgment in favor of defendants.

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II.

PROPERTY INTEREST

In evaluating Wolfenbarger's due process claim we look to Oklahoma law to determine the nature and extent, if any, of her property interest in the stereo items.[6] See Bishop v. Wood, 426 U.S. 341, 344 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). A pawnbroker, as the pledgee of pledged property, does not hold title to the property under Oklahoma law. Miller v. Horton, 69 Okla. 147, 170 P. 509, 511 (1917). Legal title remains in the pledgor and possession only passes to the pawnbroker, who has a special property interest in the item pledged

[6]We are aware of no Oklahoma authority on the question whether a pawnbroker's interest in stolen property is one protected by the due process clause. The record contains an unpublished Oklahoma Court of Appeals decision purportedly addressing this question. Under Oklahoma law, however, unpublished Court of Appeals opinions are not considered

until the obligation secured by the pledged property is satisfied. Id. The district court concluded, and defendants argue on appeal, that because Wolfenbarger had no title to the stereo items and could not prevail in a suit against the true owner, she therefore had no constitutionally protected property rights. We disagree.

It is true that under Oklahoma law, no one can confer a better title than he has. Wolfe v. Faulkner, 628 P.2d 700, 702 (Okla. 1981); Al's Auto Sales v. Moskowitz, 203 Okla. 611, 224 P.2d 588, 591 (1950); see also Okla. Stat. titl. 12A, § 2-403(1) (1981) (buyer of goods cannot acquire greater title than seller). Since the true owner of the property cannot be divested of his ownership by a thief without consent,

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binding and are not to be cited as precedent. See Okla. Stat. tit. 20 § 30.5 (1981).

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even an honest pawnbroker cannot hold stolen property as against the true owner. Adkisson v. Waitman, 202 Okla. 309, 213 P.2d 465, 466 (1949). However, Wolfenbarger's lack of title is irrelevant to the existence of her rights in the property as against defendants. Under Oklahoma law, one who possesses property without having title to it nonetheless has a recognized property interest.

First, a pawnbroker's special property interest will support an action for replevin. See Williams v. Williams, 274 P.2d 359, 362 (Okla. 1954); cf. Riesinger's Jewelers, Inc. v. Roberson, 582 P.2d 409, 411 (Okla. App. 1978). In such an action the question of ownership and the right to possession is for the trier of fact. Henderson v. Lacy, 347 P.2d 1020, 1021 (Okla. 1959). In addition, possession is prima facie proof of ownership. Al's Auto Sales, 224 P.2d

at 591. Because there had been no judicial determination of either the property's ownership or the right to possess it, Wolfenbarger's possession was prima facie proof that she was entitled to retain the stereo equipment at the time defendants confiscated and turned it over to Logens.

More importantly, the Oklahoma Supreme Court has held that even one who acquires stolen property from a thief has a lawful and enforceable property interest in such property. In Snethen v. Oklahoma State Union of the Farmers Educational & Cooperative Union, 664 P.2d 377 (Okla. 1983), the court was faced with deciding the property rights of a good-faith purchaser of stolen property. While acknowledging that a purchaser under defective title could not hold against the true owner, the court noted that the purchaser has a "qualified

possessory interest" and has "lawful possession against all the rest of the world." Id. at 381. The court distinguished between "legal" and "lawful" property interests, and stated:

> "A legal interest is enforceable against the whole world. A good-faith purchaser for value acquires an interest that is lawful and enforceable against all the world but the legal owner. Although it is only a qualified possessory interest, it is lawful and enforceable to a very large extent."

Id. (emphasis added).

Although the ultimate issue in Snethen was whether one could have an insurable interest in stolen property, its reasoning and holding also apply to this case and refute the argument that Wolfenbarger had no legally protected property interest in the stereo equipment.

The record does not indicate, nor do defendants allege, that Wolfenbarger was anything but an innocent pawnbroker who gave value for a pledge of stolen property. Like a good-faith purchaser for value, an innocent pledgee's lack of title does not defeat the lawfulness of her possession, nor does it diminish her rights against the rest of the world, including defendants in this case.

Finally, the relevant Oklahoma statute itself demonstrates that the holder of stolen property has some protected interest, because the state has provided for a judicial determination of ownership or possession prior to the return or release of seized property. See Okla. Stat. tit. 22 §§ 1321, 1322. It is defendants' bypassing of this required procedure that Wolfenbarger claims offends due process.

The district court reasoned that it

did "not interpret section 1983 or the Constitution to permit the recovery of damages for seized property to a person whose right therein is in derogation of the rights of the true owner." Rec. vol. I, at 99. This conclusion erroneously assumes that the existence of a property interest depends only on one's ability to recover damages for the actual value of the items seized.

Wolfenbarger does not claim that her right to own the property was violated but rather, that her right to due process was violated. Although she may not recover the actual value of the items once she assumed the business risk of erroneously dealing with a thief, she may recover other damages for the violation of her right to due process. She may be entitled to nominal damages, see Carey v. Piphus, 435 U.S. 247, 266-67 (1978), punitive damages against some of the

defendants, see Smith v. Wade, 103 S.Ct. 1625 (1983); Lavicky v. Burnett, 758 F.2d 468, 477 (10th Cir. 1985), or injunctive or declaratory relief. The fact that she does not have all the remedies available to a true owner with legal title is therefore irrelevant to the threshold issue of whether she has some constitutionally protected property interest.

Accordingly, we hold that Wolfenbarger had a constitutionally protected property interest in the stereo items sufficient to support a claim of violation of due process. The district court erred in holding to the contrary.

III.

DUE PROCESS

Defendants claim that even if Wolfenbarger had a protected property interest, their actions did not violate due process because Oklahoma provides

adequate post-deprivation remedies. They rely on the Supreme Court's decisions in Hudson v. Palmer, 104 S.Ct. 3194 (1984), and Parratt v. Taylor, 451 U.S. 527 (1981). For the reasons set forth below, we believe neither of these decisions support the grant of summary judgment in this case.[7]

In Parratt, a state prisoner sued prison officials under section 1983 alleging that their negligent loss of a hobby kit violated his right to due process under the Fourteenth Amendment. The Supreme Court hed that no due process violation occurs when a state employee

[7]Due to its resolution of the property interest question, the district court did not reach this issue. Defendants offer it as an alternative ground on which to uphold the grant of summary judgment, and we therefore address this issue's merits on appeal. Some of the defendants also argue on appeal that they are protected by immunity. We believe this issue is best developed in the first instance in the trial court.

negligently deprives an individual of property, so long as the state provides an adequate post-deprivation remedy. The Court recognized that

> "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking... satisf[ies] the requirements of procedural due process."

Parratt, 451 U.S. at 539. The Court noted that where a loss of property is caused by the random, unauthorized act of a state employee, the state cannot predict when the loss will occur. Id. at 541. As the Court observed,

> "[i]t is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under 'color of law,' is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation."

Id.

In Hudson, the Court reaffirmed and extended the reasoning of Parratt to an unauthorized and intentional deprivation of property by a state employee. See 104 S.Ct. at 3203-04. In holding that such a deprivation does not violate due process, the Court explained:

> "The underlying rationale of Parratt is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur. We can discern no logical distinctions between negligent and intentional deprivations of property insofar as the 'practicability' of affording predeprivation process is concerned. The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct."

Id. at 3203. In rejecting the contention that one who intentionally deprives another of property can provide predeprivation process and therefore must do so, the Court in Hudson emphasized

that "[t]he controlling inquiry is solely whether the State is in a position to provide for predeprivation process." Id. at 3204. In this connection, the Fifth Circuit recently noted:

> "Parratt posits a distinction between (1) the random and unauthorized (and hence unpredictable conduct of a state actor, and (2) conduct that the state can contain and direct by institutional safeguards. If the state cannot protect the individual by imposing predeprivation procedures, or if quick action is essential, the best the state can do is to allow injured individuals to recover damages after the injury has occurred."

Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984) (citations omitted).

The situation in this case differs significantly from that in Parratt or Hudson. To begin with, not only is the state in a position to provide predeprivation process, it has expressly done so through the enactment of sections 1321 and 1322. Oklahoma has recognized

that far from being impracticable or impossible, a hearing after the police initially take possession of property and before they release it is the most timely and efficient point at which to adjudicate property interests. Cf. Coleman v. Turpen, 697 F.2d 1341, 1344 (10th Cir. 1983). The state recognizes this point as the time at which the harm to an individual can best be minimized while also accommodating the state's interest in restricting the movement of allegedly stolen property.

Once the police have confiscated and secured allegedly stolen property, the "necessity for quick action by the State," Parratt, 457 U.S. at 539, is no longer present. Defendants do not suggest, nor can we discern, any justification for an accelerated or immediate return of such property to one claiming ownership. The existence of

sections 1321 and 1322 belie any suggestion that the state has or recognizes any need for such swift or expedited action, once the police have secured the property. Thus, one of the fundamental rationales of Hudson and Parratt, the need for quick action, is absent from this case. See Augustine, 740 F.2d at 327.

The record developed prior to the summary judgment motion indicates that the additional critical elements of random and unauthorized state conduct are not present here. In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the Court held that Parratt does not apply, and that post deprivation remedies do not satisfy due process, where a deprivation of property is caused by conduct pursuant to established state procedure. See Id. at 435-37; see also Hudson, 104 S.Ct. at 3204. This distinction between random,

unauthorized conduct and conduct pursuant to established state procedure is significant. See, e.g., Augustine, 740 F.2d at 327-29. As the Court noted in Logan, once the state has conferred a property interest, it may not authorize the deprivation of such an interest without procedural safeguards that comport with the standards of federal due process. See 455 U.S. at 432.

In Patterson v. Coughlin, 761 F.2d 886 (2d Cir. 1985), the Second Circuit recognized that "established state procedure" involves more than the mere promulgation of procedures. There the court addressed an argument that Parratt and Hudson required dismissal of a section 1983 action against prison officials who, contrary to state law, refused to accord petitioner due process before ordering him to disciplinary confinement with loss of good time credits. The district court had

dismissed the claim, stating: "Because the procedures existed, but were allegedly not followed, no meaningful predeprivation hearing was possible." Id. at 889-90. The appellate court rejected this contention.

> "Allegations of procedural due process violations by certain individual government employees, as opposed to direct challenges to state procedures or the lack thereof, have long been accepted as constituting state action and forming the basis for a claim under the civil rights statutes. See, e.g., Monroe, supra, 365 U.S. at 172; Home Tel. & Tel. Co., supra, 227 U.S. at 278, 282-85; Mansell v. Saunders, 372 F.2d 573, 576 (5th Cir. 1967). The requirements of the due process clauses are directed specifically to the federal and state governments. They require the promulgation of laws and regulations providing for regular procedures which the government must follow before it may deprive an individual of life, liberty or property. The execution of those laws and regulations also must confirm to due process; otherwise the due process clause, with its guarantees of regular and predictable procedures, becomes a cipher. It is beyond cavil that due process requires more than the

> mere promulgation of laws and regulations, which if followed, would preserve the most fundamental of rights."

Id. at 891 (footnote omitted) (emphasis added). The court concluded:

> "Unlike the deprivation of property that occurred in Parratt, here the responsible state officials who had the power to grant appellant a hearing obviously knew that appellant was in peril of being deprived of his liberty interest. . . . Thus, the deprivation of liberty was neither 'random' or 'unauthorized.'

Id. at 892 (emphasis added).

In Lavicky v. Burnett, 758 F.2d 468 (10th Cir. 1985), we recently considered a similar situation. In that case, Oklahoma sheriffs and deputy sheriffs seized a larceny defendant's pickup truck for use as evidence at the defendant's trial. Although the defendant was convicted, no part of the truck was introduced as evidence at trial and the defendant's attorney subsequently requested the truck's return from the

prosecuting assistant district attorney. The prosecutor refused to return the truck until a third party had been allowed to remove a number of the truck's parts which he claimed the defendant had stolen from him. The prosecutor directed the sheriffs to turn over the parts, even though there had been no hearing as required by Okla. Stat. Ann. tit. 22, §§ 1322. We held that the sheriffs and prosecutor had violated the defendant's procedural due process rights and that Parratt and Hudson did not bar his claim. We reasoned that "[t]hese actions constitute an intentional deprivation that may not be characterized as random. . . . This action, planned and authorized, is not the sort of action for which postdeprivation process will suffice." Lavicky, 758 F.2d at 473 (citing Logan, 455 U.S. at 436-37). See also Garcia v. Salt Lake City, _____ F.2d _____, No.

82-1505 (10th Cir. July 17, 1985) (county liable where jail personnel established unconstitutional jail customs contrary to written policy); cf. Gregory v. Town of Pittsfield, 53 U.S.L.W. 3616, 3617 (O'Conner, Jr., withwhom Brennan, J., and marshall, J., join dissenting from denial of certiorari) (questioning whether Parratt suggests that so long as state makes remedy available, contrary municipal policy comports with constitution.

We believe the reasoning and holding of Lavicky apply to this case. The record developed thus far indicates that the seizure and subsequent disposition of the stereo equipment were planned and authorized. District Attorney Tannery's letter to Chief Gillian reflects a conscious decision to alter the department-wide policy concerning allegedly stolen property and it is undisputed that Williams, Bean, and

Gillian acted in direct response to this policy and the orders initiated by Tannery. Ten days after Tannery's letter to Gillian, Williams and Bean seized the stereo equipment, relying on this directive. It is also undisputed that Williams returned the property to Logens only after direct written authorization from Assistant District Attorney Perrine, acting on Tannery's behalf. In fact, the record indicates that on another occasion defendants followed an almost identical course of conduct with other property belonging to Wolfenbarger.

The conduct of which Wolfenbarger complains is the direct result of a directive issued by the district attorney, who under Oklahoma law shares with the county sheriff responsibility for law enforcement in the county. See Okla. Stat. tit. 19 § 215.5 (1981); Op. Okla. Att'y Gen. No. 79-98 (1979). As a result

of his position as an enforcement executive, law enforcement agents are guided by the district attorney's interpretations and policies. His decisions thus take on a force and effect that can lead to widespread abuse of official power. As we recently noted in Hewitt v. City of Truth or Consequenes, 758 F.2d 1375, 1379 (10th Cir. 1985), it is precisely the abuse of official power that 42 U.S.C. § 1983 was designed to remedy. We conclude that official acts initiated and controlled by a district attorney cannot be characterized as random or anauthorized. Accordingly, Parratt and Hudson do not apply to Wolfenbarger's due process claim.

The judgment of the district court is reversed and the cause is remanded for proceedings consistent with this opinion.

83-2331 - MARGARET A. WOLFENBARBER d/b/a SHADY SAM'S PAWN SHOP v. CLANCY WILLIAMS, et al.

SETH, Circuit Judge, dissenting:

I must respectfully dissent from the majority position because I am not convinced that we should decide the due process issue on the basis of this summary judgment record, and as an issue not decided by the trial court. I would remand to the trial court.

If the due process issue is to be decided I would apply Parratt v. Taylor, 451 U.S. 527, and Hudson v. Palmer, 468 U.S. ___, 52 U.S.L.W. 5052, and thus would depart from the majority opinion. I also no longer agree with the majority opinion in Lavicky v. Burnett, 758 F.2d 468 (10th Cir.), relied on by the majority opinion herein, although I was on the panel in that case, since I now see the error of my ways.

The Fourteenth Amendment due process clause is, of course, not intended to protect citizens from deprivations of property by individuals whether they be public employees or officials. The protection afforded is only against the state itself.

The problem which immediately arises in an examination of a deprivation of property incident, as in the case before us, is that it is difficult to keep the focus on the state itself in the "random" and "unauthorized" evaluations of pre-deprivation conduct as directed by the Supreme Court in Parratt v. Taylor and Hudson v. Palmer, and not to let the focus slip back to the point of view of the employees involved in the incidents. The individuals are the actors and the defendants and the first impulse is to evaluate especially the "random" element from their position.

The "random" and "unauthorized" conduct from the position of the state is demonstrated in Hudson in the intentional deprivation there concerned, but from the position of the employee it was there not random but intentional and planned. In the case before us the action of the officials from their point of view was not random but intended and planned. However, in looking at the acts from the position of the state itself, as we must, the acts were random, unexpected and unpredictable. They were such that predeprivation due process was "impracticable" as in Hudson. As the Court there said:

> "Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the State is in a position to provide for predeprivation process."

The random elements of Hudson are thus present and we are not concerned with the alternative need for quick action.

The Court in Logan v. Zimmerman Brush Co., 455 U.S. 422, was concerned with an act of a state agency in setting plaintiff's hearing date on a discharge claim beyond the time provided by state law. The state court held that, since it was beyond the statutory time, the agency conducting the hearing was without jurisdiction. The Supreme Court held the late setting was a direct action of the state agency in terminating plaintiff's right to a hearing. The operation of the state machinery itself was the fault. The court refers to "state procedure," and to the term in Parratt used in contrast to a random act by a state employee, but this is a narrow concept as the case includes only statutory dates and hearings. The Court so indicates in Logan after a reference to Parratt's mention of "established state procedure":

> "Here, in contrast, it is the state system itself that destroys a

> complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference--whether the Commission's action is taken through negligence, maliciousness, or otherwise. Parratt was not designed to reach such a situation. See id., at 545 (second concurring opinion). Unlike the complainant in Parratt, Logan is challenging not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards."

In my view, when the focus is on the state the deprivation of the property was just as "random" here as it was in Hudson. As the Court said in Parratt:

> "The loss of property, although attributable to the State as action under 'color of law,' is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation. That does not mean, of course, that the State can take property without providing a meaningful postdeprivation hearing. The prior cases which have excused the prior-hearing requirement have rested in part on the availability of some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities."

Even if the Logan decision is vastly expanded, we have here no "established state procedure" which was followed. Instead there is a letter from the District Attorney suggesting that items believed to be stolen found in pawnshops should be seized and taken to the police station. There is also a form signed by an Assistant District Attorney authorizing the delivery of the property so seized (and other property) to the person claiming ownership. The form was for the release of "evidence," but there was no case. There was no determination of the rights of plaintiff by a hearing or otherwise. No one was identified as the thief nor was anyone prosecuted for a theft of the items reported stolen. No action was filed. The identity of the person who pawned the property was also never established. The serial numbers on

the property reported stolen by Mr. Loggens and on the pawned items matched.

Although in my view it is not significant, I cannot agree with the characterization of the District Attorney as a "policymaking state official." In Oklahoma there is no chief law enforcement officer among the county officials. The sheriff and the District Attorney are on a par as to this function and are to assist each other in the performance of law enforcement duties. The District Attorney has the duty to "prosecute all actions for crime committed in his district," and defend civil actions brought against the counties. The District Attorney is to give advice to county officials. He is elected on a district-wide basis. There appears to be no indication in the statutes that the District Attorney is to give advice to city and town policy departments. But he

or she is to prosecute violations of the state criminal laws which take place in his district. His policymaking seems to be limited to deciding whether to prosecute or not.

Thus, even if the District Attorney is a policymaker in directing the disposition of property contrary to state statutes, he is not the 'state" for the purpose of the Fourteenth Amendment. He is at best a public employee directing action contrary to state law in a random way.

As indicated in the majority opinion, the trial court decided only the property interest issue, and found none to support the action. The proceedings were cut short and no other issues were considered. Under the admonitions of Parratt and Hudson the examination of the due process question, in my view, is not completed and cannot be completed on this

record which at the most describes some pre-deprivation process.

I see no indication in the decisions on the particular issue before us nor in the basic Fourteenth Amendment opinions which would permit us to characterize these decisions by district or county officials as actions by the state itself within the Logan decision. The action of the Assistant District Attorney here concerned in directing the release of the property to Mr. Loggens without any determination as to the rights of the plaintiff should not be regarded as a statement of policy, if that is significant, nor be considered as "established state procedure" as the term is used in Parratt. The action instead was a random act by the official as far as the state is concerned and as far as the Fourteenth Amendment is concerned.

There are innumerable levels of policymaking in state and local government including that made in local police departments. As considered in this context all public employees are "policymakers" in some of their functions. It is difficult to see how this "policy" can become "established state procedure" without doing violence to the Fourteenth Amendment and to the Hudson and the Logan opinions.

The characterization of the acts of local employees as "policymaking" as a device to place the considerations of process into the pre-deprivation category only is not responsive to Hudson and Logan. It destroys the balance between state and federal courts in the determination of the basic issues.

I would remand the case to complete the due process evaluation by an examination of post-deprivation remedies.